

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
MAR 31 2008


Clerk

DAVID W. BURTON,

Plaintiff,

vs.

MIKE MULLER, Now Unit Manager
Housing, Harmon Unit,
Mike Durfee State Prison; and
TOM HOOKER, Housing Staff
Coordinator, Unit "C" Trustee
Building, Sioux Falls,

Defendants.

* CIV 06-4045

* ORDER

Plaintiff late filed his response to the Defendants' Motion for Summary Judgment which also served as his objection to the Magistrate Judge's Report and Recommendation which recommended that the Defendant's Motion for Summary Judgment be granted. Plaintiff is pro se and his response to Defendants' Motion for Summary Judgment was due May 21, 2007, and was prepared March 10, 2008, and filed March 12, 2008. The excuse claimed is that Plaintiff's landlord interfered with Plaintiff's mail and that Plaintiff made his response as soon as he was aware of the Motion for Summary Judgment and Report and Recommendation. It appears from the Court Clerk's records that the Plaintiff was diligent in updating his address with the Clerk of Courts. As a result, the Court will consider Plaintiff's response as not having been waived. The Court has reviewed Plaintiff's response even though it was not timely filed. Even if the Plaintiff's response to the Motion for Summary Judgment was timely filed, the response would not, on the merits, prevent the entry of Summary Judgment for Defendants.

The remaining issue was whether or not there had been a constitutional violation because of

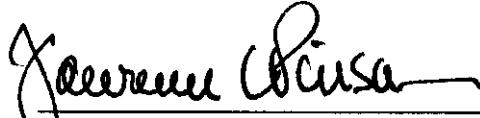
claimed retaliation against the Plaintiff. Plaintiff's claims of retaliation made in his sworn Motion are speculative and do not give rise to a triable issue of fact. In addition, even construing Plaintiff's claims, including his latest March 10, 2008 Motion liberally, the Plaintiff has not stated a constitutional violation. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 57, is ADOPTED by the Court, Plaintiff's March 10, 2008, Motion, Doc. 59, is DENIED, and the Defendant's Motion for Summary Judgment, Doc. 47, is GRANTED; and this case is dismissed.

Dated this 31st day of March, 2008.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK

By: Shelly Margulies
Deputy